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NOTES ON DIVORCE PROCEDURE.*

Whether the person who had jurisdiction over spiritual causes originally was a magistrate among the Druids like the King in democratic Greece, it is idle to speculate, but Chancellor Kent has observed that, in England:

> "All matrimonial and other causes of ecclesiastical cognizance belonged originally to the Temporal Courts; (vide case of Legitimation and Bastardy, Sir J. Davies' Rep. 140, and his argument in the case of Praemunire ib. 273) and when the spiritual courts cease the cognizance of such causes then would it seems, as of course, revert back to the lay tribunals." Wightman, 4 John. Ch. 347.

During the usurpation the court of chancery exercised jurisdiction of alimony, there being no spiritual courts, nor any toleration of the Civil law. Upon the re-establishment of Courts Christian, the court of chancery no longer retained jurisdiction. 1 Mad. Ch. 385.

After the usurpation in the years 1717 and 1740, the chancery courts took cognizance of bill for alimony, 'Willaims *v.* Callow, 2 Vern. 752; Watkyns, 2 Atk. 98, because alimony, although a creature of the ecclesiastical courts, was a legal right of maintenance recognized by the common law. Edgerton, 12 Mont. 122; Harris, 31 Gratt. 13; In re Popjoy, 26 Col. 32; Lang, 76 W. Va. 205.

In Colonial Virginia the General and County courts granted a mensa divorces, and the Legislature a vinculo as well. 1 Col. Dec. 167-8; Almond, 5 Rand. 662.

In fact, lay courts in Colonial times in Virginia took cognizance of all spiritual causes. Goodwin *v.* Lunan, 1 Jeff. 96.

The act of Feb. 17, 1827, gave power to the chancery courts in Virginia to grant a mensa divorces for the many causes for which

*Note.—For brevity in these notes in citing cases where the defendant's name is the same as the plaintiff's the former has been omitted.

a vinculo divorces are now granted, and in conjunction therewith, empowered the court to decree concerning the estates of the parties, or either of them, the maintenance of wife and children, and custody of minor offspring. Suppl. Rev. Code 1819, p. 222.

Such power is not inherent in our courts as successors of the ecclesiastical courts of England. Fornshill *v.* Murray, 1 Bland Ch. (Md.) 479.

Since the courts in Virginia have been authorized to grant divorces, our statute law upon the subject is to be looked to as the sole fountain of jurisdiction over persons and their property in proceedings for divorce. Kiser, 108 Va. 734

Where the legislature has empowered courts to grant divorce, it has been held, in the absence of statute, they cannot decree in conjunction therewith as to the estates of the parties. State *v.* Templeton, 18 N. D. 525.

The early statutes in Virginia prescribed such suits should be instituted and conducted as other suits in equity, with certain statutory exceptions as to the mode of proof of allegations of bill.

INSTITUTION OF SUIT—RULE DAYS.

The suit is instituted by process called a summons, which is now returnable to the Rules.

At common law pleadings were originally ore tenus in Court. Afterwards when pleadings were required to be in writing, there were no Rule days in England, but by statute and Rules of Court, return-days were inaugurated for the return of the writ of summons during the session of the courts, though the Clerke issued the processes and all pleadings were filed with him. See Sheridan's Pr., pp. 41, 42, 78, 79; 191-2-3-4.

In Colonial Virginia the Quarter Court had three return days.

> "The said court to have three returns: (1) the first return to be made three days before the first day of the sitting of the Court. (2) The second on the sixth day of the court, and (3) the third on the twelfth day of the court."

The plaintiff was required to put in or file his petition upon the day of appearance, the return day, and in case of such neglect to be non-suited. The Quarter Court had a Secretary and Councillors, and the Clerke was the Secretary's Clerke. 1 Hen. St., p. 271, Acts 1642; 1 Hen. St. 66.

It was later provided in Virginia that:

"The Clerkes of the Court shall from time to time keep records of the proceedings of the County courts." 1 Hen. St. 303.

Later, Clerks were appointed by the County Courts. 1 Hen. St. 448-9.

It was afterwards provided that "the original declaration or bill be always filed in the office." 11 Hen. St. 71.

This latter provision may have been made because of the practice prevailing of making up all pleadings before the court in session and filing them in open court. See 12 Hen. St. 467-9.

Under Acts of 1717 establishing the High Court of Chancery in Virginia, writs of summons, or subpœna, were returnable to the first and seventeenth days of the term. It was further provided that the "plaintiff shall file his bill within one calendar month from the appearance day, or may be ruled to do so within one month from said rule on pain of suit being dismissed." 9 Hen. St. 391.

In the General Court the return day was the eighth or twenty-third days of the court. The appearance day for the defendant was the second day after the end of the court to which process was returned. 9 Hen. St. 408.

Rules or orders made by the Clerk for the Court, to expedite the maturing of causes for hearing in the vacation of the courts, were first established in Virginia by the Act of Jan. 5, 1788, for reforming procedure in county courts. It was thereby provided that:

"'All imparlances be taken and pleadings to be filed in common law and chancery until an issue is joined, shall be done at Rules to be held monthly in the Clerk's Office on such days as the court at their quarter session shall appoint, which Rules shall be distinctly entered in a book to be kept for that purpose, and the Clerk shall be allowed the same fees, *as if the same had been made in court,* and all Rules to declare, plead and reply and for other proceedings shall be given from month to month. . . .' 'The Court may at their quarter next after any of said Rules, for good cause to them shown, set aside any of the said Rules and make such order concerning the same as to them may appear just and right.'" (Italics ours.) 12 Hen. St. 467-8.

By the Acts 1804-5 it was provided that:

"Separate distinct Rule and Court Dockets shall be kept in the County and Corporation Courts.

By the Acts of March 27, 1826 it was provided:

"That Rules shall be held monthly in vacation and in term on the first Monday in every month in the Clerk's Office of the Superior Courts of Chancery, and may be kept open for six days." Supplement Rev. Code 1819, p. 132.

Upon these statutes our modern Rules in vacation are built. The object of these Rule days was to empower the Clerk to hold a term for the Court in his office at stated periods between the terms of the Courts or their vacation periods, and to have the term—become final, after the end of six days,—now by statute reduced to three days. Therefore, except for such clerical errors as a court could after its term, modify or correct its judgments, the Clerk could not alter or change his orders, or judgments, called "Rules," because the Clerk was not empowered to correct substantial material mistakes at his next Rule term, but such power alone was given to the Court in term.

And it was accordingly held that an irregularity committed by the Clerk at one Rules cannot be corrected at the next Rules, but only by the Court in Term succeeding the Rules at which the irregularity was committed by the Clerk. See Southall *v.* Exchange Bank, 12 Gratt. 315-16.

Counsel was expected to attend the sessions of the Clerk during Rule days, and if the complainant's suit had become discontinued by failure to timely proceed with his cause at Rules, the defendant was not expected to attend at any subsequent Rule days, and should not be prejudiced by an unauthorized act or judgment of the Clerk at Rules subsequent to the discontinuance of the suit. See Southall *v.* Exchange Bank, *supra.*

"Rules are orders in vacation of the Court made by the Clerk and entered in a Rule Docket specially prescribed by the statute for the purpose. The six days together make but one day. . . ." Botts *v.* Pollard, 11 Leigh. 431.

As the Virginia Code requires the Clerk to keep a written Rule Book or Docket, the entries therein are as much a part of the record in a chancery cause, as the papers, exhibits, affidavits, evidence and pleadings filed, or papers tendered, which are mentioned in an equity decree, and thus become a part of the record of the cause.

In common law actions as well, the several proceedings at Rules

or in court, until rendition of judgment, constitute the record, in parts. Roanoke L. & I. Co. *v.* Karn & Hickson, 80 Va. 591.

The object of Rule days is merely to expedite the maturing of the causes in vacation, and the Rules that are taken in a cause are the orders of the court though made in the Clerk's Office. Wohlford *v.* Trinkle, 90 Va. 231.

Where the declaration or bill is not filed by the Clerk during the Rules, it may be filed by the Court under authority given by sec. 6140 Code 1919, and pleadings made up in open court. So. Express Co. *v.* Jacobs, 109 Va. 27.

Under Code 1919, secs. 6078-6079, a non-suit and a dismissal of the suit or action in the Clerk's Office in the vacation of the Court are interlocutory orders. But every non-suit or dismissal entered therein shall, if not previously set aside, become a final judgment as of the last day of the term in the Circuit and Law and Equity Courts of the City of Richmond, if placed on the court docket during the term, and, as of last day of the next term, or the 15th day thereof (whichever may happen first) in the Circuit Courts of the Counties of Virginia pursuant to sec. 6134 Code 1919.

It is the duty of the Clerk to place non-suits and dismissals on the court docket in the order in which the proceedings at Rules are terminated. Code 1919, sec. 6243.

After the term has ended in the Circuit Court and the Law and Equity Court of Richmond City, and the *next* term has commenced in the Circuit Courts for the Counties, an office judgment becomes final, and the Court is powerless afterwards to vacate such final judgment. See Jones *v.* Hancock, 117 Va. 511.

Notwithstanding the Court is given control over all proceedings in the office during the preceding vacation, non-suits and dismissals entered by the Clerk become final like office judgments, after the end of next term or 15th day thereof, whichever may happen first in the Circuit Court of the Counties.

Where, however, Clerk dismisses suit during vacation irregularly, that is, without authority so to do, for such irregularity the court is by the statute given control over Clerk's action at the succeeding term and may reinstate the cause or action. City of Radford *v.* Brooks, 5 V. L. R. (N. S.) 868.

The return day to which a writ or summons should regularly

be made is the day to which it is made returnable, and not on some later day during the Rules, but delay in returning the writ until some later day during the Rules does not nullify the writ and the service. This Rule is not changed by the fact that the service and the return are made by an unofficial process server. Bell *v.* The Joseph & Bro., 5 Va. L. R. (N. S.) 284.

Under Code 1919, sec. 6079, the one month's elapse after process returned executed before the bill is filed, must be computed from the return day of the writ, and not from the previous day on which process might have been served. City of Radford *v.* Brooks, *supra.*

By pleading over after an irregularity of the Clerk at Rules, or after the omission of party to plead at Rules, the orderly proceedings at Rules are *waived* by the suitor for whose benefit they were established. Buchanan *v.* King's Heirs, 22 Gratt. 414.

FALSE RETURN OF PROCESS.

A false return by an officer is conclusive at law and in equity, unless the party for whose benefit the service is made colludes with the officer. Ramsberg *v* Kline, 96 Va. 465; Southerland *v.* People's Bank, 111 Va. 515

SUBSTITUTED SERVICE OF PROCESS VITIATED.

Where officer failed to explain purport to wife though husband actually received process from hands of wife. Park Land Co. *v.* Lane, 13 Va. L. R. 66.

By posting, where return did not show officer left it posted, and that the notice or writ was posted and left posted by him at usual place of abode, but returned instead, "posted on front door of dwelling-house." Lewis *v.* Boikin, 4 W. Va. 533; Gasden *v.* Johnson, 1 Nott. and McCord 89.

THE BILL FOR DIVORCE.

The bill in a mensa and a vinculo causes should be so framed as to set forth all facts necessary to establish the statutory ground of divorce from bed and board, or from the bond of matrimony. It is not sufficient to merely state that the defendant has been guilty of the statutory grounds for divorce or separation, as that the defendant had been guilty of cruelty, wilful desertion, or adultery, but the facts constituting these charges should be set forth; otherwise proof cannot be made of them as the *probata*

and *allegata* must correspond. There is no more reason for permitting latitude in this than in any other chancery proceeding. In fact, there is every reason of public policy why the plaintiff and defendant should in divorce suits, come into court full handed with the proof, and not expect to fish-up evidence.

A bill for divorce which simply states conclusions of law, or in other words, the statutory ground without more should be made to go into particulars, on motion for that purpose, or on demurrer.

Thus in charge of adultery, the time, place and circumstances should be stated. White, 121 Va. 246; Miller, 92 Va. 198-9.

The Answer.

The real purpose of an answer is to apprise the plaintiff of the extent and nature of the defense offered to the bill, and so inflexible is this principle, that a defendant can avail himself of no matter of defense not stated in the answer, even though it is established by the evidence. Johnson *v.* Mundy, 123 Va. 748; 1 Hogg. Eq. Proc. sec. 397.

Equity can only decree upon the case made by the pleadings, bill, answer, or plea, and not upon the evidence or proofs of allegations outside of the pleadings.

All testimony when offered which is not within the scope of the facts alleged in the bill and answer, and which effect a surprise on the opposite party, should be excluded when object has been made timely to its introduction.

Answer as Evidence.

Where the bill fails to waive the oath of the defendant to the answer, answer is evidence in his favor. Throckmorton, 86 Va. p. 768; Carter, 82 Va. p. 624.

After answer filed neither bill, nor cross-bill may be amended so as to waive oath. Throckmorton, *supra.*

Amended Answer.

If events occur after answer filed, they should be brought to the attention of the Court by a supplemental answer in the nature of a plea *puis derrien continuance* at common law. If matter is omitted, by amended answer.

In either case, application for leave to file an amended or sup-

plemental answer should be made to the Court and supported by affidavits showing clearly that this step is necessary. 1 Hogg. Eq. Proc. secs. 343-347.

THE PLEA.

Where a plea is a complete defense to the prosecution of the suit, it may be filed alone, without being accompanied by an answer.

The Code of Virginia provides for the trial of plea (as to its truth only) by a jury. As to its sufficiency, it is still set down for argument, notwithstanding the statute.

The verdict of a jury on the trial of a plea in equity is as final as the verdict of a jury on an issue in an action, and can only be set aside by the court for the same matter for which a verdict in a law court may be set aside. It is therefore, unlike the verdict of a jury on an issue out of chancery, which it is discretionary with the court to accept or reject. See Townsend, 126 Va. 640.

THE CROSS-BILL, AND AMENDED CROSS-BILL.

The cross-bill is mostly employed to obtain affirmative relief. The defense of waiver, called "condonation" of the ground for divorce or judicial separation may be made by answer.

The cross-bill is also employed to bring forth a recriminatory charge which is a statutory ground for divorce, and which is a bar to the suits, and upon which also affirmative relief may be obtained.

A recriminatory charge of adultery committed by the plaintiff after the commencement of the suit is a valid defense, and of necessity may be made available by supplemental or amended answer. 9 R. C. L., p. 428.

Where the cross-bill, or answer treated as a cross-bill, charges adultery, which is a ground for divorce a vinculo, newly discovered adultery may be added, when presented timely to the court, by amended cross-bill. Willard, 98 Va. 465.

It has been held that an additional charge of subsequent adultery with a person other than the one named in the original complaint cannot be made by a supplemental pleading. 9 R. C. L. 427-8.

But in Virginia, such additional charge of adultery with another person is permitted. Williard, *supra.*

And where the adultery is committed after the answer of the defendant has been put in, wife will be permitted, if she applies immediately after the discovery of the fact, to set up the defense in a supplemental answer, or by a cross-bill in the nature of a plea *puis darrien continuance.* Crouch, 78 W. Va. 713; Martin, 33 W. Va. 701.

Where, however, the original bill and cross-bill make a case for a judicial separation only,—the latter recriminating a ground for divorce a mensa,—and adultery prior to the commencement of the suit is discovered during its continuance, it seems that it cannot be recriminated for reasons amended, cross-bill originally asked in cross-bill, it would make a new ground of suit inconsistent with the affirmative relief. See Smith, L. R. A. 1917-B, pp. 246-8 note.

Although adultery, or other ground for divorce a vinculo may be recriminated in a suit for divorce a vinculo, or a mensa, yet, it is said in States where cruelty or desertion are only grounds for *separation,* they are not defenses to an action for divorce. II Bishop Divorce (1921 Ed.), sec. 1724.

Thus, where wife is deserted by her husband, and then commits adultery, husband is entitled to divorce for her adultery, and her recriminatory charge of desertion is ineffective. Ibiden, sec. 1724.

So also a wife guilty of adultery cannot obtain a divorce on any ground, while a wife guilty of adultery may maintain an action or suit for a separation. Ibidem, sec. 1724.

While cruelty in Virginia is ground for an a mensa divorce only, wilful desertion continued for three years is by statute made a ground for divorce a vinculo, and, therefore, may be recriminated against divorce.

Where the bill charges desertion, and cruelty is recriminated, as both charges only warrant a judicial separation, they may be recriminated. Crounse, 108 Va. 108.

Recriminatory acts may not only furnish a bar to the suit, but entitle the spouse recriminating to affirmative relief thereon, as well.

The Decree—Collateral Attack.

The decree is the record of the Chancellor's Court. It not only contains the judgment of the court, but a reference to all papers

tendered, or filed, the evidence upon which the court has acted, the report of its commissioner, sometimes its opinion and other matters. Matters or papers not mentioned in the decree, are not part of the record.

There is every presumption that a statement in a decree is correct. Carton *v.* Bostic, 123 Va. 365.

Domicile on Face of Decree.

Unless a want of jurisdiction appears from the face of the proceedings, that is from face of all of the papers mentioned in the decree, it cannot be successfully assailed collaterally in a local jurisdiction. See Saunders *v.* Link, 114 Va. 285; Freeman on Judg. sec. 120a.

Where a decree is collaterally attacked locally, if allegation or finding as to the plaintiff's residence or domicile does not appear from the face of all the proceedings, it is not, however, a ground for setting aside the decree, after the expiration of the time allowed for an appeal therefrom, an appeal should be taken. See Faulkner, 90 Wash. 74: Gum, 122 Va. 40.

But as the state has no power to change the matrimonial condition of strangers temporarily within the territory, and as every nation may determine the status of its own domiciled subjects and any interference by foreign tribunals would be officious intermeddling with a matter of which they have no concern, the parties cannot assent to a change of status, and, upon collateral attack in a foreign jurisdiction, if the decree does not show on its face that court had jurisdiction, it is void. See Brown on Jurisdiction, sec. 77; also Jones, 108 N. Y. 415.

Ever since the Act of 1827, our legislative policy has been to continue to confer on the chancery courts the power to pronounce TWO SEPARATE JUDGMENTS in a divorce proceeding; the one *in rem* changing the marital status, the other *in personam* as to the property rights of the parties, and at the same time, providing for the maintenance and custody of the children. Code 1919, sec. 5111.

Finality of Judgments.

These judgments need not be passed at one time, and in practice are frequently not so made. Until the court has determined to change the status, it would be premature to pronounce a judg-

ment concerning the estates of the parties, maintenance of the wife, or custody of the children; for it can only do the latter by making "such further decree as it shall deem expedient concerning the estates of the parties or either of them," etc., after it has determined to grant divorce.

In the Henninger case after decreeing divorce to wife, the cause was sent back for a further reference to a commissioner to put the court in a position to determine the rights of the parties concerning their estates. Henninger, 90 Va. 271.

Reference to a Commissioner, however, is mere matter of convenience.

As such suits shall be instituted and conducted as other suits in equity, with exceptions mentioned by statute as to proof of allegations of bill, the finality of such judgments must be tested by equitable rules governing decrees. See Code 1919, sec. 5106.

Applying those rules; after the end of the term, the judgments become final and cannot be modified or revised as to the CHANGED STATUS, or ESTATES of the parties, except that in a mensa causes, alimony may be modified, contracted, or enlarged. And if provision had not been made for revision as to the custody of the children after the term by the statute, either parent, upon absolute divorce, having right or a surviving parent, would have power to make any disposition of the children he or she chose. See Code 1919, sec. 5111.

But the act in question retains control beyond the end of the term over the minor children, and their maintenance, giving court power, on the application of either parent, to revise its own decree in the interest of the children.

These judgments as to status, estates, and alimony, are final, because a decree cannot be in part interlocutory and in part final; while the parties are in court it is interlocutory, when they are sent out, final. See Ryan *v.* McLeod, 32 Gratt. 367.

Therefore, after the end of the term in which the decree altering the status of the parties has been pronounced, although the parties are kept in court to enable the court to make a further decree *in personam* as to their estates, or maintenance for the wife, or provide for the support and custody of the children, the decree is final.

A final as well as an interlocutory decree may make provision

for parties to come back, because of the flexibility of chancery decrees.

Where the further action of the court IN the cause as distinguished from the further action of the court BEYOND the cause is necessary to give the complete relief contemplated by the court, the decree is interlocutory.

But where upon the hearing, all these matters are settled by the decree, though much may remain to be done before it can be completely carried into execution, and though to effectuate such execution, the cause is retained and leave given the parties to apply for the future aid of the court, the decree is final. Fleming *v.* Bolling, 8 Gratt. 299.

A final decree is not converted into an interlocutory decree by retaining the cause on the docket, and rendering a subsequent decree in the same cause. Nelson *v.* Jennings, 2 Pat. & H. 369.

Or will a decree be held final, though so termed and cause left off docket by the Clerk, and there is nothing in the decree showing the court intended to put an end to the cause. Ward *v.* Funsten, 86 Va. 359.

A decree is not final, but interlocutory, which leaves anything to be done to afford complete relief contemplated, and may be altered in the sound discretion of the court however great the lapse of time. Wright *v.* Strother, 76 Va. 857.

It can readily be seen, that after the court has spent its power and altered the marital status of the parties by decreeing a divorce from the bond of matrimony, though it retains the cause to make a further decree, concerning property rights, maintenance and the custody of the children, it has passed a final decree or judgment on the status, and after the term if it were permitted to revise or revoke such a decree, the rights of the parties might be injuriously affected.

And all decrees, orders and proceedings in a cause after the rendition of a final decree are erroneous and must be reversed. There are but two ways known to the law whereby a final decree, not on a bill confessed (6 Munf. 267) can be set aside; that is by bill of review or appeal. Battaile *v.* Md. Hospital, 76 Va. 63; Smith *v.* Powell, 98 Va. 431.

As an interlocutory decree may be altered in the sound discretion of the court, however great the lapse of time, it should fur-

ther confirm the view, that the decree as to status is final, and has such attributes of a final decree, that the court in the exercise of a sound discretion, even if it were considered interlocutory only, should not alter it.

Reservations may be made in final decrees for liberty for the parties to come back, but not for the purpose of revoking a decree altering the status, except in pursuance of statutory authority therefor. The statute gives courts power to revoke its own a mensa decree upon the *joint* application of the parties. Code 1919, sec. 5115.

Unless for fraud; after the end of the term the court is without power to revoke its final decree. White, 130 Cal. 579; Livingston, 173 N. Y. 377.

We know of no statute that authorizes a court to grant to parties an indefinite time within which to move the court to reinstate a suit in which a final decree has been rendered, and which has been stricken from the docket. It will readily be perceived how such procedure might operate great prejudice to those who have acquired rights under the decree. Shelton, 125 Va. 381-385.

RESERVATIONS—RES ADJUDICATA.

Reservations are powers withdrawn from the cause and engrafted upon the decree, from which thenceforth they derive their whole force and efficacy. Cooke's Admr. *v.* Gilpin, 1 Rob. 44.

An improper reservation, or improper suspension, made in a final decree, unless there is an appeal therefrom, is nevertheless *res adjudicata,* and cannot be collaterally attached. See Bodkin *v.* Arnold, 45 W. Va. 90.

As each granted power is spent by entering a final decree or judgment on the issues, viz.: the marital status, or estates of the parties, any reservation of such spent powers is improper.

Upon granting an a mensa decree the Court has power to provide that "Such decree shall operate upon property thereafter acquired, and upon the personal rights and legal capacities of the parties, as a decree for a divorce from the bone of matrimony, except that neither party shall marry again during the life of the other." Code 1919, Sec. 5112.

This section of the statute when read in connection with sec. 5111 of the Code, the former operating on the estates of the parties, their personal rights and capacities by virtue of the statutory

self-executing provision, and the latter by interposition of the discretionary power of the court, shows that any revision of the decree as to third parties, as well as the parties themselves, might injure them.

ESTATES OF THE PARTIES—SEC. 5111, CODE 1919.

The discretion concerning the estates of the parties is narrower than as to alimony.

It is not an arbitrary discretion, but a judicial one. Harris, 31 Gratt. 16.

"It would not do to provide that the property of the party in fault, or such portion of it, should be taken from him or her and given to the other. . . The Policy of the law is not to oppress the frail and erring, or to drive them to helplessness and despair. It is rather to reclaim the weak and erring, and to invite and allure them back to the paths of virtue, when they have, in an evil hour, departed therefrom." Porter, 27 Gratt. 606-607.

The very great weight of authority is to the effect that unless there is express statutory authority therefor, the court possesses no power to vest in the wife title to a specific portion of the husband's estate as alimony. Lovegrove, 128 Va. 449.

As far as the courts have been justified in going in the absence of such a statute is:

(A) To require the husband to restore to the wife property acquired in virtue of the marriage. Van Duser, 6 Paige (N. Y.) 366;

(B) And to reciprocally extinguish all marital property rights of the one in the property of the other. Gum, 122 Va. 40.

In addition to the power conferred under Sec. 5112, to perpetually separate the parties, by which the decree operates on after acquired property by virtue of the statute, as to existing rights in property attaching by virtue of the marriage, Sec. 5111 gives Court power to extinguish all of these in its discretion.

In the exercise of this discretion, as to alimony and the estates of parties the following conditions may arise, viz.:

The parties may not put their estates in issue.
One spouse may be non-resident, and not appear in cause.
Support may have been given wife and children in a criminal proceeding.

Where in a suit for divorce for a supervenient cause the prop-

erty rights of either of them are put in issue, but not settled in the suit, the matter is *res adjudicata,* because they are issues which might have been disposed of in the divorce suit. Osborn *v.* Throckmorton, 90 Va. 316.

Where property rights between the parties arising out of the marriage relation are not adjudicated in the divorce action, the judgment or decree therein is not *res adjudicata* as to such rights so as to operate as a bar to a subsequent action between the parties for their adjustment. Thomas, *27* Okla. 784; 35 L. R. A. (N. S.) 124.

Where jurisdiction to pass on the question of alimony was wanting in the divorce suit, even though there was sufficient to sustain a judgment effecting merely the marital status, it is not *res adjudicata.* Toncray, 1123 Tenn. 476.

A divorce granted *ex parte* to the husband in another State whose court acquired jurisdiction by substituted service only, does not bar the wife's right subsequently to apply for alimony. Cox, 19 Ohio St. 502.

Domicile is a factor only so far as a court has jurisdiction to change the marital status as to which it is a proceeding *in rem.* The judgment concerning the estates of the parties is *in personam,* and cannot reach beyond the state's line. See De la Montanya, 112 Cal. 101.

DOWER.

When the wife is defendant and she is out of the jurisdiction and not personally served with process within the State, many courts have held, where no appearance was made, that she could not be barred of dower in lands of the husband situated in other States than that in which the divorce was obtained, and this seems to be the rule, but only applicable to lands owned and possessed by the husband at the time the divorce was granted and not applicable to property afterwards acquired. Brown Jurisdiction, Sec. 7.

Where a non-resident spouse does not appear, the Court can make no decree affecting the person, property or custody of children without its jurisdiction. Brown on Jurisdiction, Sec. 78.

Although the Court in granting a divorce for adultery of a spouse may decree he or she shall not re-marry, it cannot so decree non-marriage against a non-resident guilty of adultery Garner, 56 Md. 127.

In other words, a Court may snap the *vinculum* of its own domiciled subjects or citizens, releasing him or her, from the bond of matrimony with the foreign citizen or subject as to their marital status, and property *within* its jurisdiction. As to property and rights *without* its jurisdiction, the non-resident spouse's vinculum is still unsnapped.

As in the absence of statute court has no power to vest in the wife title to a portion of husband's property as allowance for alimony. Lovegrove, *supra;* Russell, 4 G. Green (Ia.) 26.

A lis pendens is ineffective on a claim for alimony, except where by statute the court may decree specific property of husband as permanent alimony to the wife. Houston *v.* Timmerman, 17 Ore. 499; Powell *v.* Campbell, 20 Nev. 232.

Yet, where non-resident husband's property is in the State, it may be appropriated by proper attachment proceedings in satisfaction of alimony. Wesner *v.* O'Brien, 56 Kans. 724.

While the divorce a vinculo for a supervenient cause operates to cut off not alone dower, curtesy, distributive share, and homestead, because neither spouse can when the right has become consummate or accrued, answer the description of "husband," or "wife," it is more usual to extinguish these marital rights in an a mensa decree, though out of abundant precaution, extinguishment of such rights have been incorporated in an a vinculo decree as well. See Porter, *supra* as to curtesy.

MODIFYING ALIMONY JUDGMENT—CUSTODY OF CHILDREN.

Permanent alimony in conjunction with an absolute divorce is a creature of the statute. Green, 49 Neb. 546.

After end of term such a judgment is final and cannot be revised. Lampson, 16 R. I. 456.

There is no provision in Sec. 5111, Code 1919, for revising alimony in a vinculo divorce.

Therefore, decree should reserve power to modify, upon application of either party. Lockbridge, 3 Dana (Ky.) 28.

It would likewise be well to make a similar provision in a mensa decrees owing to the statutory character of the award, though it is held, in the absence of such a statute, court has power to modify a mensa alimony. 60 Am. Dec. 668 Note. C. J. Divorce, 248.

Where alimony is awarded as incident to a divorce a vinculo, the right of modification, unless given by statute, or reserved in

the decree itself, ceases with the severance of the marital tie. Mayer, 154 Mich. 386.

The fact that the wife is awarded permanent alimony, does not relieve husband for support of child, incurred by mother of child. Graham, 38 Col. 453.

Because, an allowance of alimony is distinct from an allowance which the husband is required to pay for maintenance of children. In re Austin, 173 Mich. 428.

Consent Decree for Alimony.

Unless entered as the Court's own decree (Wallace, 74 N. H. 256) a consent decree for alimony cannot be modified except with the consent of the parties. Pryor, 88 Ark. 302.

Where the decree is altered as to custody of the children, it should not be ex parte. Phillips, 24 W. Va. 591.

Non-Support Order.

The wife may inaugurate a criminal proceeding for her support against her husband, and an order may be entered therein, either before, or upon the conviction of her husband, requiring him to maintain her for one year, and this order may be renewed from year to year, and she may then afterwards file a suit for divorce a mensa et thoro, or a vinculo matrimonii, to change the marital status alone. See Acts 1918, p. 759.

The proceeding under the acts of 1918 for her support, is a criminal proceeding in which the Commonwealth is plaintiff, and the husband, defendant. See Draper's Case, 115 Va. 941.

The wife, under these circumstances, should not ask the interposition of the Court in her suit for divorce, to decree her support, and it seems. she would not be entitled to such a decree.

But, during the pendency of the divorce proceedings, the wife may cause a criminal prosecution to be instituted for her support under the criminal statutes, and, upon the application of the husband, the chancery court will enjoin the wife from testifying in the criminal proceeding, though it has no jurisdiction to enjoin the court in the prosecution of a criminal proceeding.

Two courts cannot at the same time entertain suits concerning the same subject matter and adjudicate the rights thereto of the same parties. The Court first acquiring a concurrent jurisdiction retains it to the exclusion of the other. Griffin *v.* Birkhead, 84 Va. 612.

But the criminal courts and the chancery courts have not concurrent jurisdiction, though in a sense the subject matter may be the same, the party plaintiff is not.

The chancery court, however, may enjoin or prohibit the wife, who is a party to the chancery cause, from testifying or aiding in the prosecution of the criminal proceeding for her support. See Mayor of York *v.* Pilkington, 2 Atk. 302.

If the wife goes out of court with a divorce a vinculo, and fails to have court decree concerning her support, the criminal jurisdiction cannot be invoked, because she no longer bears the relation of *"wife"* to her divorced husband See People *v.* Dunstan, 42 L. R. A. (N. S.) 1065.

MODIFYING ALIMONY FOR MISCONDUCT OF WIFE.

While the decree a mensa allowing alimony to the wife is res adjudicata as to the alimony, the parties are still married, and the court will refuse to execute its decree for alimony for the adultery of the wife.

On the other hand, a wife divorced a vinculo cannot of course be guilty of adultery in its technical sense, and, as she owes no duty of chastity to her former husband, the court will not at the instance of the husband cut her off from alimony. Cariens, 50 W. Va. 113; Cole, 142 Ill. 9.

A mensa alimony is decreed *dum casta,* and wife does not come into court with clean hands, if she is guilty of adultery; in a vinculo alimony, though she comes into court unclean, if guilty of fornication, she comes not into court with unclean hands as to her former husband.

Notwithstanding sec. 5113, Code of 1919 which provides that: "such bond of matrimony shall not be deemed to be dissolved as to any subsequent marriage, or in any prosecution on account thereof, until the expiration of six months" from the date of the decree, at the end of the term in which the decree as to status is pronounced, and also concerning the estates of the parties upon divorce a vinculo, it is final, though no marital rights attach to subsequent marriage, as it is void, and party re-marrying within such period is subject to criminal prosecution for bigamy.

ALIMONY NOT A DEBT.

A decree awarding alimony is not a debt which has been put in the form of a judgment, but rather a legal means of enforc-

ing the husband's obligation to his wife and children. Wetmore *v.* Markoe, 196 U. S. 68.

While a decree for alimony as to accrued instalments in a divorce a vinculo may be enforced as a judgment in a foreign jurisdiction, and, where there has been reserved a power of the court to modify it, it be shown that it is then unmodified, a decree for alimony *pendente lite* being subject to modification and vacation by the court which decreed it, is not enforceable in a foreign jurisdiction. See Henry, 74 W. Va. 563.

After appeal, the court can make no order for alimony or suit money. Prohibition lies to such an order. Cralle, 81 Va. 773.

Enforcement of Alimony Decrees.

There is no vested right in a party to have the execution of a decree performed in any particular manner. Mootry *v.* Graynor, 44 C. C. A. 83.

A court of equity has always jurisdiction to carry its decrees into effect. Newman *v.* Chapman, 2 Rand. 93; Trimble *v.* Patton, 5 W. Va. 435.

Whether the decree be interlocutory or final, the parties have always a right to the aid of the court to carry its decrees into effect, whether liberty to apply to the court be reserved or not. Cooke's Admr. *v.* Gilpin, *supra.*

An original bill may be filed to have a decree executed after the term has ended, but the usual mode is by issuing fi. fa. on the judgment for accrued alimony, or by contempt proceedings. See Hairston, 117 Va. 207; Isaacs, 1 Va. L. R. (N. S.) 540.

The statute provides that all decrees for money in equity causes have the force and effect of judgments at law.

The proceedings for contempt for failure to pay alimony, are proceedings *beyond* and not *in* the cause, and its conduct is governed by common-law rules as modified by statute. After the cause is ended, there can be no appeal after the lapse of one year from the alimony decree. There can be no appeal from the order in contempt proceedings. The statute prescribed a writ of error to have same reviewed, and therefore, the party attached, should file bills of exceptions, or certificate of exceptions, to obtain review. See Code 1919, Secs. 4929-4932.

Habeas corpus does not lie. Ex parte Virginia, 100 U. S. 339.

ENTITLEMENT OF CONTEMPT PROCEEDINGS.

Contempt proceedings may be entitled in the style of the chancery cause as they are incident thereto, and may be filed with the papers in the cause. Stokley *v.* Commonwealth, 1 Va. Cases 330; Brown *v.* Andrews, 1 Barb. (N. Y.) *227*; Fisher *v.* Hayes, 6 Fed. 63.

The rule in West Virginia is different. There the contempt proceedings should be separated from the chancery suit and placed on the law docket. State *v.* Irwin, 30 W. Va. 404.

The court's judgment is void, in contempt proceedings, if statute required jury trial. Brown on Jurisdiction, p. 371.

For contempt of alimony decree, no jury trial is required by statute in Virginia.

Court will discharge husband where inability to comply is shown. But there should be no commitment unless ability to comply is clearly shown. Ex parte Beavers, 80 W. Va. 80; C. J. Divorce, p. 304, sec. 609.

The husband may be committed for his voluntary disablement. Wright, 74 Wisc. 439.

For form or orders in contempt proceedings see Almond, *supra;* Purcell, 4 H. & M. 507; Forbes *v.* State Council, 107 Va. 853.

IMPEACHING DECREE OF DIVORCE.

A bill of review founded on after discovered evidence, may be filed to review a decree even after it has been affirmed by the appellate court.

There may also be a supplemental bill in the nature of a bill of review. Connelly, 32 Gratt. 661.

The bill of review must be filed within the time prescribed by statute.

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